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IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1940
No. 949

TRAVELERS INSURANCE COMPANY
Petitioner,

versus

MILDRED T. WILKINS,
Respondent.

REPLY BRIEF OF RESPONDENT, MILDRED T. WILKINS, TO THE PETITION FOR WRIT OF CERTIORARI

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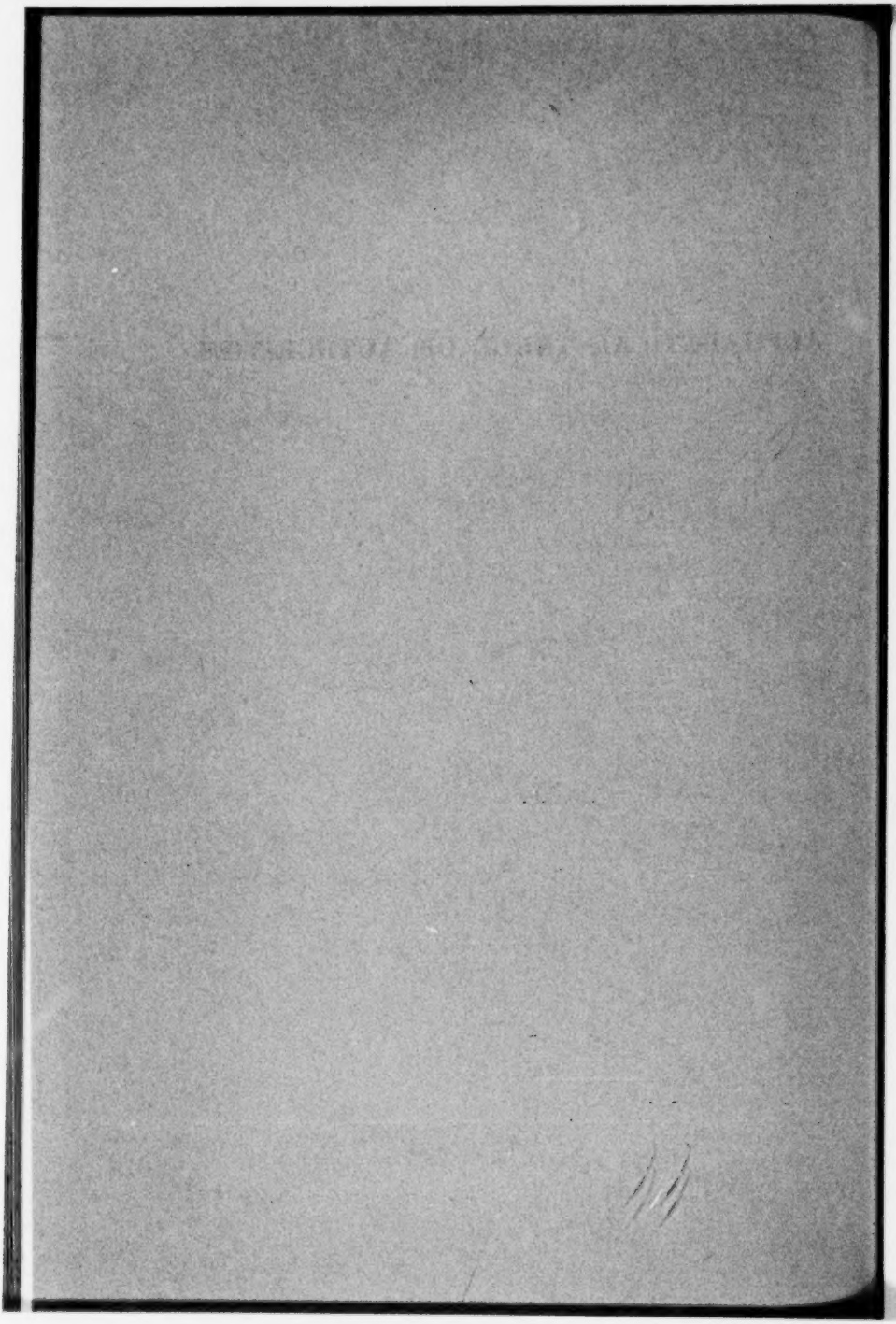

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This case does not present any question for review on writ of certiorari.

There is no federal question involved.

The Circuit Court of Appeals has not rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter.

The Circuit Court of Appeals has not decided an important question of local law in conflict with applicable Florida decisions.

Quite to the contrary.

The contract here in question was a Florida contract governed by Florida law, and there are applicable Florida decisions which were properly followed by the Circuit Court of Appeals.

The present case involves a suit brought by the insurance company to cancel two policies of insurance on the life of the deceased. The theory upon which the insurance company based its claim for cancellation was that because the insured visited his personal physician subsequent to the signing of the application for the policies, but prior to the delivery thereof and the payment of the first premium, the insured was guilty of fraud in not advising the insurance company of these visits.

In Florida the test of whether a false representation has been made so as to permit the insurance company to cancel the policy is *whether the insured acted in good faith.* This is true even when the erroneous statement is an affirmative answer to a direct question. It is, of course, much more essential to show bad faith when the alleged misrepresentation, as in this case, consists of an unanswered question which was not propounded to the insured at all, but which the insurance company is seeking to carry forward into the future by indirection and legal presumption.

It is admitted that the insured gave absolutely true answers to each and every question propounded to him in the application. The insured did visit his doctor after the date of the signing of the application and before the date of the delivery of the policies, but was told by his doctor that his illness was of a purely transitory nature due entirely to excessive smoking and overwork. The insured did not miss one moment of time from work. He was not put on any diet or given any medicine (other than a tonic), and he was not even advised to follow any specified medical regime. He was not told or led to believe that he was an ill man in any sense of the word, and he was discharged as a well man prior to the date of the delivery of the policies. To use the doctor's own words in answer to a question on this particular subject:

> "Q. Was there anything that you can remember that you said to Mr. Wilkins, or that you conveyed to Mr. Wilkins that would in your opinion convey to his mind that he was not a well man when you discharged him?
>
> A. No, not in the least." (Record 60-61).

Not a single witness was introduced, nor was any evidence of any kind introduced to prove, or attempt to prove, that the insured did not think himself a well man prior to the date of the delivery of the policies and the payment of the first premium. Nor was there anything in the record to indicate that the insured did not act in com-

plete good faith in his dealings with the insurance company. Quite to the contrary, all of the testimony of all of the witnesses indicated that the insured did act in good faith and actually did believe himself to be a strong, well, vigorous individual up to the date of his death.

On these facts the case, as properly held by the Circuit Court of Appeals, is controlled by applicable Florida decisions.

In the case of *New York Life Insurance Company v. Kincaid* (Fla.) 165 So. 553, false answers were given by the applicant to direct questions, yet the Florida Court held, in line with the generally recognized rule, that such false answers did not operate to avoid the policy because the insured was not shown to have knowledge of their falsity and was, therefore, *not shown to have been acting in bad faith.*

In the Kincaid Case, the insured, in applying for reinstatement of a policy, certified to the company in writing that:

1. To the best of his knowledge and belief he was in the same condition and health as when the policy was issued.

2. Within the last two years he had had no illness, disease or bodily injuries, nor had he consulted or been treated by a physician except by Dr. W. Osenback on July 24, 1929, for hemorrhoids.

The truth of the situation was, as the Insurance Company found out later:

1. The Insured had been treated by Dr. Osenback, not only on July 24, 1929, but in August, 1927, April, May, 1928, and in June and July of 1929.

2. He had had abcesses on the chest and neck.

3. Dr. Osenback had removed a cyst and wart from his face.

Having discovered these facts the Company brought suit to cancel the policies. Holding that there was no evidence of a knowing or deliberate and intentional misrepresentation and that therefore the Company was not entitled to cancellation, the Court said:

> " * * * It is now contended that Kincaid knowingly made misrepresentations to the Company in that he did not disclose all his visits to Dr. Osenback, and what he was treated for each time during the two-year period covered by the questionnaire and that his policies would not have been reinstated if the undisclosed visits and what they revealed had been known to the Company. The issue of whether or not Kincaid knowingly made misrepresentations to the Company was fully developed by plea, replication, rejoiner, and surrejoinder, which we have examined, but do not deem necessary to enlarge on here.
>
> "Even if he failed to make a full disclosure with reference to his insurability, it does not necessarily vitiate his reinstatement. *The test is whether or not his answers to the questionnaire were made in good faith . . .*" (Italics supplied)

The good faith test established by the Kincaid Case was again recognized by the Florida Supreme Court in the recent case of *Winer v. New York Life Insurance Company* (Fla.) 197 So. 487, decided July 12, 1940, where the Court said:

> "This Court laid down the rule in New York Life Insurance Company v. Kincaid that *the test where Insured failed to make a full disclosure with reference to insurability in application for reinstatement of a lapsed policy of life insurance is whether or not the Insured answered the questions in good faith* and that the question of good faith of the Insured is for the jury to determine. This rule should be applied to the present case but since this is a suit in equity the question of good faith of the Insured is left to the chancellor to determine. *The question of good faith of Insured at the time of answering the question in the application for reinstatement is the sole issue in this case.*" (Italics supplied)

The present case is an *a fortiori* case. Here the insured did not give false answers to direct questions, as was done in both the Kincaid Case and the Winer Case — he gave true answers. He merely failed to tell the insurance company that he had visited his doctor (between the date of the application and the date of the delivery of the policy) to be treated for what he thought was a negligible and minor indisposition from which he promptly recovered. He was definitely and positively so advised by his doctor. Obviously, the test of good faith is all that applied here, and

the Circuit Court of Appeals held that the insured met this good faith test.

The Circuit Court of Appeals was, therefore, merely applying Florida law.

In view of the above Florida decisions, which are controlling, on the facts of this case, and in view of the fact that there is no federal question involved, the petition for certiorari should be denied.

The two cases relied upon by petitioner: *Stipcich v. Metropolitan Life Insurance Company,* 277 U. S. 311, and *Massachusetts Bonding and Insurance Company v. Hoxie* (Fla) 176 So. 480, do not control the issues here, nor are they applicable. The opinion of the Circuit Court of Appeals (Record 141-142) analyzes these two decisions and clearly demonstrates that they are not in point.

That opinion (Record 142) likewise recognizes that the Kincaid Case and the Winer Case do control.

We respectfully submit that the petition for certiorari should be denied.

Charles H. Murchison

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